Supreme Court, U.S.
FILED

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No. 99-

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

LENOX MICHAEL OKOLIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Samuel Manly
Counsel for Petitioner
LAW OFFICES OF SAMUEL MANLY
Kentucky Home Life Building
239 South 5th Street, Suite 1606
Louisville, Kentucky 40202-3208
Telephone (502) 585-4619
Facsimile (502) 583-5960

25pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the one-year statute of limitations added to 28 U.S.C. § 2255 by the Antiterrorism and Effective Death Penalty Act, effective April 24, 1996, runs on April 23, 1997, or on April 24, 1997?

LIST OF PARTIES

The parties to the proceedings below were Lenox Michael Okolie, incorrectly identified as "Lenox Ibeghunam Lenox Ibeghunam Michael Okolie," and United States of America.

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---

PETITION FOR WRIT OF CERTIORARI

Lenox Michael Okolie, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled case on September 17, 1999.

OPINION BELOW

The September 17, 1999, order of the Court of Appeals, whose judgment herein is sought to be reviewed, is unreported and is reprinted in the Appendix to this petition at pp. A-1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1999.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

TITLE 28, UNITED STATES CODE

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially

recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105, as amended Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)

STATEMENT OF THE CASE

Petitioner Lenox Michael Okolie ("Okolie") seeks review of the judgment of the Court of Appeals for the Eleventh Circuit, denying him a certificate of appealability on his appeal from the dismissal of his 28 U.S.C. § 2255 motion for post-conviction relief by the United States District Court for the Southern District of Florida, which dismissed his § 2255 motion, filed April 24, 1997, as untimely under the limitations provisions added to 28 U.S.C. § 2255 by the Antiterrorism and Effective Death Penalty Act ["AEDPA"]. The district court for the Southern District of Florida was the court of first instance and had original subject matter jurisdiction under 28 U.S.C. § 2255.

Petitioner filed his § 2255 motion on April 24, 1997, the first anniversary of the date of enactment of AEDPA's amendments to § 2255 which included the addition of a one-year statute of limitations.

Without reaching the merits of petitioner's claims for post-conviction relief, the district court dismissed petitioner's § 2255 motion as time-barred [Order of Dismissal, filed February 3, 1998], for the reasons stated in a report of a magistrate judge who opined that, ". . . § 2255 motions must

be filed *before* April 24, 1997 [Report of Magistrate Judge, filed December 31, 1997, emphasis in original]."

Petitioner timely filed his notice of appeal to the Court of Appeals for the Eleventh Circuit, and on September 17, 1999, the Eleventh Circuit denied petitioner's motion for a certificate of appealability without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUITS ARE SPLIT AS TO THE COMPUTATION OF AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS

The writ should be allowed as to Question I, to resolve a split in the Circuit Courts of Appeal as to the proper method of computing AEDPA's one-year statute of limitations.

The Third Circuit in *Burns v. Morton*, 134 F.3d 109, 112 (3d Cir. 1998); the Fourth Circuit in *Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir. 1998); the Seventh Circuit in *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997), and more recently in *O'Conner v. United States*, 133 F.3d 548 (7th Cir. 1998); the Ninth Circuit in *United States v. Valdez*, 195 F.3d 544, 546 (9th Cir. 1999); the Tenth Circuit in *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997); and the Eleventh Circuit in *Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998) hold that, in order to be timely, a

motion for post-conviction relief must have been filed by April 23, 1997, or prior to April 24, 1997.

On the other hand, the Second Circuit in *Mickens v. United States*, 148 F.3d 145, 148 (2d Cir. 1998); the Fifth Circuit in *Flanagan v. Johnson*, 154 F.3d 196, 199-203 (5th Cir. 1998); the Sixth Circuit in an unpublished opinion, *Hagen v. United States*, 1999 WL 1073693 (6th Cir. 1999); and the Eighth Circuit in *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) hold that such a motion is timely if filed on or before April 24, 1997.

Although April of 1997 has come and gone, the problem continues to arise in the Courts of Appeal as to motions for post-conviction relief filed in April of 1997; and will predictably arise with respect to the computation of time from other events triggering the commencement of the period of limitations, not only under AEDPA but under other federal statutes of limitations that, like AEDPA, do not contain their own methodology for computing the running of time.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

Samuel Manly
Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 99-4047-H

LENOX MEGHUNAM LENOX
IBEGHUNAM MICHAEL OKOLIE,
Petitioner-Appellant,

versus [FILED 09/17/99]

UNITED STATES OF AMERICA,
Respondent-Appellee,

Appeal from the United States District Court for the Southern District of Florida

ORDER

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a showing of the denial of a constitutional right. 28 U.S.C. § 2253(c) (2).

Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED AS MOOT.

/s/J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 97-1405-Civ-MARCUS
(90-475-Cr-MARCUS)
ORDER AFFIRMING REPORT
AND RECOMMENDATION
[FILED 11/12/98]

THIS CAUSE came before the Court upon Lenox Michael

Okolie's ("Okolie"), Motion for Reconsideration of the Order of Dismissal, or, in the alternative, for a Certificate of Appealability pursuant to 28 U.S.C. § 2253 (#630).

THE MATTER was referred to the Honorable United States Magistrate Judge Charlene Sorrentino for a Report and Recommendation on the Motion. Judge Sorrentino filed a Report and Recommendation recommending that the motion be denied. Okolie has filed Objections to Magistrate Sorrentino's Report and Recommendation. The Court has reviewed the file and Okolie's objections, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that United States Magistrate Judge Sorrentino's Report and Recommendation on Okolie's Motion for Reconsideration, or, in the alternative, for a certificate of appealability is hereby RATIFIED, AFFIRMED and APPROVED, and based thereon, Okolie's Objections thereto are OVERRULED and DENIED. Therefore, it is

ORDERED AND ADJUDGED that Okolie's Motion for Reconsideration, or, in the alternative, for a Certificate of Appealability is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of November, 1998.

/s/ Donald L. Graham

DONALD L. GRAHAM

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 97-1405-Civ-MARCUS
(90-475-Cr-MARCUS)
ORDER DENYING MOTION FOR
RECONSIDERATION
OR IN THE ALTERNATIVE MOTION
FOR CERTIFICATE OF APPEALABILITY
MOTION TO VACATE
[FILED 04/15/98]

For the reasons stated in the report of the Magistrate Judge, and after independent review of the file, it is

ORDERED AND ADJUDGED that the motion for reconsideration or in the alternative for certificate of appealability pursuant to 28 U.S.C. §2253 and Fed.R.App.P. 22(b), as amended April 24, 1996, (DE#630) is denied.

DONE AND ORDERED at Miami, Florida, this 13th day of April, 1998.

/s/Stanley Marcus
CIRCUIT JUDGE, ACTING AS
DISTRICT JUDGE BY DESIGNATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 97-1405-Civ-MARCUS
(90-475-Cr-MARCUS)
ORDER OF DISMISSAL
[FILED 02/03/98]

For the reasons stated in the Report of the Magistrate Judge, and upon independent review of the file, and observing that no objections have been filed, it is

ORDERED AND ADJUDGED as follows:

1. This motion to vacate pursuant to 28 U.S.C. §2255 is dismissed as time barred.

2. All motions not otherwise ruled upon are dismissed, as moot.

3. This §2255 case is closed.

DONE AND ORDERED at Miami, Florida, this 2nd day of February, 1998.

/s/Stanley Marcus
CIRCUIT JUDGE, ACTING AS
DISTRICT JUDGE BY DESIGNATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 97-1405-Civ-MARCUS
(90-475-Cr-MARCUS)
REPORT OF MAGISTRATE JUDGE
[FILED 12/31/97]

Lenox M. Okolie, a federal prisoner currently confined at

the Federal Corrections Institute in Manchester, Kentucky has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255 attacking his convictions and sentences for conspiracy to distribute heroin and cocaine and distribution of heroin entered after jury trial in Case No.90-475-Cr-Marcus.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b) (1) (B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

For its consideration of this motion the Court has the Movant's motion, the underlying criminal record, the Government's response and the Movant's traverse to the Government's response.

Okolie raises the following claims:

1. Denial of a fair trial based on numerous trial court errors, including permitting the introduction of perjured testimony;
2. Ineffective assistance of counsel during pre-trial, trial and appellate proceedings;
3. Improper sentence determination because the calculated drug weight was based on false witness testimony.

The government correctly argues that this motion to vacate is time-barred under 28 U.S.C. §2255.

On April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at relevant part 28 U.S.C. §§2244 and 22542255), President Clinton signed

into law the newly-enacted time limit provision of 28 U.S.C. §2244(d). Title 28 U.S.C. §2255 limits the time period for relief under that section to one year.

The limitation period runs from:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Although the Act did not contain an effective date provision for the foregoing amendments, they are presumed to have become effective on April 24, 1996, the date the law was enacted. Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) (citations omitted) ('It is well established that, absent a clear direction by the Congress to the contrary, a law takes effect on the date of its enactment.'). See also Hatch v. Oklahoma, 92 F.3d 1012, 1014 n. 2, citing Bradshaw v. Story, 86 F.3d 164, 166 (10 Cir. 1996).

The Eleventh Circuit Court of Appeals has not decided to what extent the presently relevant amendments brought about by the AEDPA, including the one-year limitations provision, apply to habeas corpus applications or motions to vacate relating to events preceding that date. Cf. Hunter v. United States, 101 F.3d 1565, 1573 (11 Cir. 1996) (en banc) (changes in appeal certificates made by §§102 and 103 of the AEDPA apply to pending §2254 cases where no application for a certificate of probable cause was filed prior to the effective date of the Act, and to pending §2255 cases where no notice of appeal was filed before that date).

Continuing research into the rapidly-developing case law in this area reveals that the majority position is represented by decisions such as Reyes v. Keane, 90 F.3d 676 (2 Cir. 1996), where the court held that the new limitations period would apply to a §2254 petition filed prior to the effective date of the AEDPA, but provided a one-year grace period (the equivalent of the new limitations period) commencing as of the Act's effective date. See, e.g., Calderon v. United States District Court for the Central District of California, 112 F.3d 386 (9. Cir. 1997) ("No petition filed on or before April 23, 1997 -- one year from the date of the AEDPA's enactment -- may be dismissed for failure to comply with the section 101's time limit."); Peterson v Demskie, 107 F.3d 92 (2d Cir. 1997) ("We conclude that a habeas corpus petitioner is entitled to a reasonable period of time after the effective date of AEDPA to file a petition... "); Holmes v. Wharton, 1997 WL 115837, *2 (N.D.Ga. 1997) ("[T]his Court agrees with the emerging

majority position that where an action accrued prior to the enactment of the AEDPA, the Act's new limitations period can only be applied to bar the action after a reasonable time has elapsed."); United States v. Lopez, 100 F.3d 113, 116 (10 Cir. 1996) (time limitation to bring a §2255 motion "attaches new legal consequences events completed before its enactment" and hence would not be applied retroactively to motion filed prior to date of enactment).

Further, the majority of courts which have considered these issues have concluded that one year is necessarily a "reasonable time," and therefore have concluded that §2254 petitions and §2255 motions filed prior to April 24, 1997, are not time-barred. See United States v. Simmonds, 111 F.3d 737, 746 (10 Cir. 1997) ("[W]e hold that the one-year limitations period reflected in the amended 28 U.S.C. §2255 is also a reasonable time for prisoners to bring §2255 motions whose convictions became final before the [AEDPA] took effect. Accordingly, prisoners whose convictions became final on or before April 24, 1996 must file their §2255 motions before April 24, 1997."); Lindh v. Murphy, 96 F.3d 856, 866 (7 Cir. 1996) (en banc), rev'd on other grounds, ___ U.S. ___, 117 S.Ct. 2059 (1997) (" ... no collateral attacks filed by April 23, 1997 may be dismissed under §2244(d) and the parallel provision added to 28 U.S.C. §2255 by §105 of the 1996 Act.").

Thus, the emerging majority position, is that when a state prisoner's §2254 claim or a federal prisoner's §2255 claim accrued prior to the enactment of the AEDPA, the AEDPA's

one-year limitation period takes effect as of April 24, 1997.

For purposes of this report, it will be assumed that the present motion was filed on April 24, 1997, which is the date that Okolie signed the 'solemn declaration" that he had placed the motion to vacate in the prison legal mailbox (Criminal DE#599) rather than April 29, 1997, which is the date that the petition was filed with the Clerk of Court. See: Houston v. Lack, 487 U.S. 266 (1988); Garvey v. Vaughn, 993 F.2d 776 (11 Cir. 1993). In this case, the movant's convictions and sentences became final on October 28, 1994, when the Eleventh Circuit issued its mandate affirming the judgment. Griffith v. Kentucky, 479 U.S. 314[1] (1986). Since this motion to vacate was not filed until April 24, 1997, over three years after the convictions and sentences became final and beyond the one-year grace period, the Court cannot consider the merits of the motion unless the movant meets certain criteria enumerated in the Act. Specifically, a movant must demonstrate that one of the following occurred within one year of the date the motion was filed: (1) the movant's judgment of conviction became final; (2) an impediment to making the motion, which was created by governmental action and which prevented the movant from making the motion, was removed;

---

1. By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Id. at 321 n.

(3) the right which the movant asserts was recognized by the Supreme Court and applies retroactively to §2255 cases; or (4) the facts on which the claim is based first were discoverable by the exercise of due diligence.

On May 12 1997, the movant was directed to explain whether he fits within one of the categories outlined in §2255, as amended. In response to the order, Okolie cited the AEDPA and relevant case law, including Simmonds and Lindh, supra, and argued that his motion was filed within the one-year limitation period. Both Simmonds and Lindh expressly state that § 2255 motions must be filed before April 24, 1997.

Okolie also argues that he delayed filing his § 2255 because he was concurrently attacking a conviction in the Eastern District of Missouri on double jeopardy grounds. However, Okolie's Missouri conviction became final on or about October 8, 1993, when the Eighth Circuit Court of Appeals denied Okolie's motion for rehearing of their May 14, 1993 decision. See: United States v. Okolie, 3 F.3d 287 (8 Cir 1993). Neither explanation can satisfy the above-listed criteria.

Since the movant has not demonstrated that he meets any of the above criteria set out in §2255 as amended, this motion to vacate is time-barred and should not be addressed on the merits.

It is therefore recommended that this motion to vacate he dismissed as untimely pursuant to 28 U.S.C. §2255, as amended.

Objections to this report maybe filed with the District Judge within ten days of receipt of a copy of the report.

Dated: December 31, 1997

/s/ Charlene H. Sorrentino

UNITED STATES MAGISTRATE JUDGE

Feb 18 2000

(2)

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No. 99-1043

In the Supreme Court of the United States

LENOX MICHAEL OKOLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13pp

QUESTION PRESENTED

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. 2255 (Supp. III 1997) to establish a "1-year period of limitation" governing motions for collateral relief under that Section. That period runs from the latest of four specified events, only one of which is relevant to this case—"the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 (Supp. III 1997). In cases such as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which prisoners may file Section 2255 motions. The question presented is whether the one-year grace period expired on April 23, 1997, or April 24, 1997.

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In the Supreme Court of the United States

No. 99-1043

LENOX MICHAEL OKOLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioner a certificate of appealability and dismissing his appeal (Pet. App. A1) is not yet reported. The order of the district court denying petitioner a certificate of appealability (Pet. App. A1-A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1999. The petition for a writ of certiorari was filed on December 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 169 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed petitioner's conviction and sentence in an unpublished order. *United States* v. *Okolie*, 39 F.3d 323 (11th Cir. 1994) (Table), cert. denied, 513 U.S. 1198 (1995). Petitioner thereafter filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. The district court denied relief and denied a certificate of appealability (COA). Pet. App. A1-A4. The court of appeals likewise denied a COA and dismissed petitioner's appeal. *Id.* at A1.

On April 29, 1997, the district court received and docketed petitioner's pro se Section 2255 motion. Pet. App. A9. In its answer to petitioner's motion, the government argued, among other things, that the motion should be dismissed as untimely under the one-year limitations period in Section 2255. Gov't Answer to Movant's Motion to Vacate 4, 12, 14.

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. 2255 to establish a "1-year period of limitation" governing motions for collateral relief under that Section. That period runs from the latest of four specified events, only one of which is relevant to this case—"the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1) (Supp. III 1997).[1] In cases such

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[1] The time limit provision provides that it runs from the "latest" of four specified events, including (2) "the date on which

as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which prisoners may file Section 2255 motions. See *Rogers* v. *United States*, 180 F.3d 349, 353-354 & n.9 (1st Cir. 1999), cert. denied, 120 S. Ct. 958 (2000).

In its answer to petitioner's motion, the government noted that "the Department of Justice has taken the position that defendants whose convictions became final prior to April 24, 1996 had until April 24, 1997 to file any motions pursuant to 28 U.S.C. § 2255." Gov't Answer to Movant's Motion to Vacate 12. The government contended that petitioner's Section 2255 motion was untimely because it was filed on April 29, 1997, five days after the end of the grace period. See *id.* at 4, 14.

The magistrate judge recommended dismissal of petitioner's motion as untimely but on grounds different from those asserted by the government. Petitioner's Section 2255 motion contained a "solemn declaration" that he had placed the motion in the prison legal mail system on April 24, 1997. Pet. App. A9. Relying on that declaration, the magistrate judge "assumed that

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the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action"; (3) "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (4) "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2255 para. 6(2)-(4) (Supp. III 1997). Those three subsections are not at issue in this case. See Pet. App. A9-A10.

the present motion was filed on April 24, 1997." *Ibid.*; see generally *Houston* v. *Lack*, 487 U.S. 266 (1988). The magistrate judge concluded, however, that the one-year grace period expired on April *23*, 1997, rather than April *24*, 1997, and she therefore recommended that petitioner's motion be denied as untimely. See Pet. App. A10. The district court adopted the magistrate judge's report and recommendation. *Id.* at A4.

Petitioner moved for reconsideration and, in the alternative, for a COA. Without requiring a response from the government, the magistrate judge recommended denial of petitioner's requests. The magistrate judge maintained the view that petitioner's motion was untimely, but also noted that "review of the case reveals that [petitioner] would have virtually no chance of success if [his] claims were considered on the merits." Report & Recommendation 5. Recommending denial of petitioner's request for a COA, the magistrate judge stated that "[r]eview of the file in this case reveals that no [substantial] showing [of the denial of a constitutional right] has been made." *Id.* at 6. The district court adopted the magistrate judge's report and recommendation. See Pet. App. A1-A2.

Petitioner filed a notice of appeal. On September 17, 1999, finding that petitioner "failed to make a showing of the denial of a constitutional right," the court of appeals denied him a COA and dismissed his appeal. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 7-8) that this Court's review is needed to resolve a conflict among the courts of appeals concerning whether a Section 2255 motion to set aside a conviction that became final before the enactment of the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA) is timely if the motion was filed on April 24, 1997. There is a conflict among the courts of appeals on that question: some courts have stated that such motions are timely until April *23*, 1997, while others have identified April *24*, 1997, as the cut-off date for filing. This Court's resolution of that conflict is not necessary, however, because the issue lacks continuing importance. Moreover, the court of appeals correctly denied petitioner a certificate of appealability (COA), because, regardless of whether his Section 2255 motion was timely, he has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (Supp. III 1997). Accordingly, the petition for a writ of certiorari should be denied.

1. As described above, in cases such as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which to file a Section 2255 motion (or a habeas corpus petition under the analogous time limit for state prisoners, 28 U.S.C. 2244(d)(1)(A) (Supp. III 1997)). See *Rogers* v. *United States*, 180 F.3d 349, 353-354 & n.9 (1st Cir. 1999) (citing cases), cert. denied, 120 S. Ct. 958 (2000); *Mickens* v. *United States*, 148 F.3d 145, 148 (2d Cir. 1998); *Burns* v. *Morton*, 134 F.3d 109, 111-112 (3d Cir. 1998); *Brown* v. *Angelone*, 150 F.3d 370, 374-375 (4th Cir. 1998); *Flanagan* v. *Johnson*, 154 F.3d 196, 200-202 (5th Cir. 1998); *Brown* v. *O'Dea*, 187 F.3d 572, 576 (6th Cir. 1999); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); *Moore* v. *United States*, 173 F.3d 1131, 1133-1135 (8th Cir. 1999); *Calderon* v. *United States District Court*, 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998), overruled on

other grounds, *Calderon* v. *United States District Court*, 163 F.3d 530 (9th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999); *United States* v. *Simmonds*, 111 F.3d 737, 745-746 (10th Cir. 1997); *Goodman* v. *United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

In calculating the precise length of that one-year grace period, some courts have stated that applications for collateral relief are timely if filed on or before April *23*, 1997, and other courts have held that such applications are timely if filed on or before April *24*, 1997. See *Rogers*, 180 F.3d at 355 n.13 (citing cases). Specifically, the First, Second, Fifth, and Eighth Circuits have held that the cut-off date is April 24. See *id.* at 355; *Mickens*, 148 F.3d at 148; *Flanagan*, 154 F.3d at 201-202; *Moore*, 173 F.3d at 1135. The Third, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits have stated that the cut-off date is April 23. See *Burns*, 134 F.3d at 111; *Brown* v. *Angelone*, 150 F.3d at 375; *Lindh*, 96 F.3d at 866; *Calderon*, 128 F.3d at 1287; *Simmonds*, 111 F.3d at 746; *Goodman*, 151 F.3d at 1337.

The United States agrees with those courts of appeals that have concluded that the deadline is April 24, 1997. All the courts of appeals that have devoted extended analysis to the question have concluded that April 24 is the correct cut-off date. The courts that have adopted an April 23 cut-off date in published decisions have done so without extended reasoning, and in cases in which the precise length of grace period did not make a difference to the outcome.[2] Federal Rule of

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[2] In unpublished decisions, the Tenth and Fourth Circuits have concluded that collateral attacks filed on April 24, 1997, are untimely. See *Garza* v. *Gibson*, No. 98-7030, 2000 WL 6194 (10th Cir.

Civil Procedure 6(a) provides that "[i]n computing any period of time prescribed or allowed * * * by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." Federal Rule of Criminal Procedure 45(a) provides, in part, that "[i]n computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included." The Federal Rules of Civil Procedure inform the proper procedure in cases under 28 U.S.C. 2254 (1994 & Supp. III 1997), and those rules and the Federal Rules of Criminal Procedure inform the proper procedure in cases under Section 2255. See Rule 11 of the Rules Governing Section 2254 Cases; Rule 12 of the Rules Governing Section 2255 Cases. This Court long ago endorsed a similar principle. See *Sheets* v. *Selden's Lessee*, 69 U.S. (2 Wall.) 177, 190 (1864).

This Court's intervention is not required, however, to resolve the tension among the courts of appeals. There is universal agreement that a one-year grace period applies to the time-limit provisions. *Moore*, 173 F.3d at 1133. The dispute over the precise length of the grace period affects only a small number of collateral attacks—those filed on April 24, 1997. Most of those cases have by now been resolved, and the issue is of little ongoing significance. Review of the issue by this Court is therefore unnecessary.

2. This case would not, in any event, be an appropriate one in which to resolve the question, because the court of appeals correctly denied petitioner a certificate of appealability, even if his Section 2255 motion was timely filed. A certificate of appealability may issue

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Jan. 6, 2000) (unpublished); *United States* v. *Runnells*, 162 F.3d 1158 (4th Cir. 1998) (Table).

only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (Supp. III 1997). Petitioner has not made that showing because the claims in his Section 2255 motion lack merit.[3]

As the government pointed out in its answer to petitioner's Section 2255 motion (page 14-17), many of the issues raised by petitioner were rejected on direct appeal and are therefore foreclosed on collateral review, and others were never raised and are therefore procedurally defaulted. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring) (collecting cases); *United States* v. *Frady*, 456 U.S. 152 (1982); *United States* v. *Perez* 129 F.3d 255, 260 (2d Cir. 1997). As to petitioner's remaining claims, the magistrate judge, in recommending denial of petitioner's request for a COA, correctly stated that "review of the case reveals that [petitioner] would have virtually no chance of success if [his] claims were considered on the merits." Report & Recommendation 5.

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[3] Some courts of appeals have held that they may review a procedural ruling denying collateral relief without a showing that an underlying constitutional claim has potential merit. See, *e.g.*, *Gaskins* v. *Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999), *Whitehead* v. *Johnson*, 157 F.3d 384, 388 (5th Cir. 1998). See also *Henry* v. *Department of Corrections*, 197 F.3d 1361, 1366 n.2 (11th Cir. 1999) (reserving question). This Court's decision in *Slack* v. *McDaniel*, No. 98-6322 (to be reargued on Mar. 29, 2000), may shed light on that issue. There is no need, however, to hold this case pending the decision in *Slack*, because, as we explain in the text, the time-limit issue that petitioner has raised has no continuing significance, and petitioner's underlying claims are without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

DAVID S. KRIS
Attorney

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